ART TREND LTD.

v.

BLUE DOLPHIN PTE. LTD. & ANOR.

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
FA CHUA J
AP RAJAH J
[CIVIL APPEAL NO. 38 OF 1982]
4 MAY 1983

CIVIL PROCEDURE: *Injunction - Interim Mareva injunction - Discharge of injunction - Effect of discharge on consent order - Court's discretion - Whether wrongfully exercised - Risk of assets being transferred out of jurisdiction - Fresh evidence, order for immediate assessment and payment of damages - Whether proper.*

The appellants, an English company, commenced an action against the respondents for sums alleged to be due to them under bills of exchange drawn by them and accepted by the respondents and under written guarantees given by the respondents in their favour, plus interests and commissions. They obtained, *ex parte*, an interim Mareva injunction against both respondents. Later, on a motion to continue the injunction, the appellants agreed to a variation of the injunction and a consent order was accordingly granted. Three days later, on the respondents' application to discharge the injunctions, the Court discharged the injunctions and on its own initiative, ordered damages to be assessed by the registrar. The appellants appealed. At the hearing, the Court was informed that in an O. 14 application the respondents had been given leave to defend the action on condition of payment into Court or a banker's guarantee.

Held:

[1] The consent order did not affect the right of the respondents to apply to the Court for release from their undertakings, and a discharge of the injunction discharged the respondents from their contractual undertakings.

[2] The trial Judge was entitled, on the evidence before him, to exercise discretion in favour of discharging the Mareva injunction. The fresh evidence regarding the risk of the assets being removed out of the jurisdiction would not have affected the Judge's decision.

[3] In the circumstances of the case, the trial Judge was entitled to make the order for immediate assessment and payment of damages sustained by the respondents by reason of the Mareva injunction. [*Ushers Brewery v. King & Co.* [1972] (1) Ch. 148 not of general application].

[Appeal dismissed.]

Case referred to:
Ushers Brewery v. King & Co. [1972] 1 Ch 148

For the appellants - M. Beloff QC (Yang with him)
For the respondents - Karthigesu (Rashid with him)

JUDGMENT

On 5 May 1982 the appellants, an English company, commenced an action against the respondents. The claim against the 1st respondent, a Singapore company, was for (1) the sum of US$33,943.05 under a bill of exchange due on 17 July 1981 drawn by the plaintiffs and accepted by the 1st respondent plus interests and commission under a discounting and financing agreement entered into between them and dated 12 February 1980; and (2) the sum of US$326,202.17 under a written guarantee dated 11 November 1981 given by the first respondent in favour of the plaintiffs and in which the first respondent had guaranteed the payment of all the liabilities of a Nigerian company known as Ojomo Industries (Nigeria) Limited (hereinafter referred to as "Ojomo") plus interests at the date of the Writ amounting to US$128,394.23 and further interests and commission payable under the guarantee.

The claim against the 2nd respondent, a partnership firm of three brothers dealing in textiles, in real estate and electronic goods, was for (1) the sum of US$182,407.93 under a bill of exchange due on 6 May 1981 drawn by the plaintiffs and accepted by the 2nd respondent plus interests as at the date of the Writ amounting to US$56,521.27 and further interests and commission payable under a discounting and financing agreement entered into between them and also dated 12 February 1980; and (2) the sum of US$326,202.17 under a written guarantee dated 21 April 1980 given by the 2nd respondent in favour of the plaintiffs and in which the 2nd respondent had guaranteed payment of all the liabilities of the 1st respondent plus interests as at the date of the Writ amounting to US$128,394.23 and further interests and commission.

On 6 May 1982 the appellants obtained, *ex parte*, an interim Mareva injunction against both respondents which in effect restrained them from removing from Singapore or otherwise disposing, whether within or without the jurisdiction, of any of their assets (including immovable properties and moneys in bank accounts) in which they (including the partners of the 2nd respondent) were beneficially interested, or otherwise pledging them or giving them by way of security. The respondents were also restrained from re-directing any payments made or to be made by their debtors from the accounts with their several banks. Paragraph 3 of the injunction stated as follows:

> The defendants shall not be prevented from dealing in any way with their assets in so far as the assets of the defendants available to meet the plaintiffs' claim herein exceed in aggregate the sum of US$1,230,000.

At least twelve banks were served with the injunction order of 6 May 1982 as a result of which the business operations of the respondents were completely halted. The proviso exempting dealings in any way with the respondents' assets as contained in the said para. 3 of the injunction order was of no assistance to the respondents. Unless each of the respondents had assets in a bank which exceeded US$1.23 million, the banks served with the order would not allow any further transactions in the accounts of both respondents. It would also appear that as the effective total claims against both respondents were for US$728,468.65 plus further interest and commission the freezing of US$1.23 million worth of assets of the respondents was plainly unjustifiable.

The 2nd respondents through their solicitors protested vigorously against the interim injunction. By a letter of 10 May 1982 they pointed out that the total claims were for US$740,261.53 whereas their assets had been frozen up to US$1.23 million. They also pointed out that they were an old established Singapore firm which enjoyed a very good reputation with their bankers who have been granting them large banking facilities without any security and that the injunction had brought their daily business operations to a grinding halt and

had caused irreparable damage to their reputation. It was also pointed out that the injunction specifically named two properties, No. 75 High Street, Singapore and No. 9 Lyndhurst Road, Singapore, one of which was worth S$6 to 6.5 million and the other S$800,000. The appellants were requested to inform the banks served with the order that they would not seek to enforce the order over the bank accounts.

The appellants through their solicitors refused to release the banks and asserted that their claim in aggregate against both respondents was for US$1.23 million and it was only on 21 May 1982 on a motion to continue the injunction granted on 6 May 1982 that they agreed to a variation of that injunction. The variation is contained in a consent Order of Court dated 21 May 1982, the material provisions of which read as follows:

> It is ordered by consent and directed that without prejudice to the 1st and 2nd defendants' right to apply to discharge the injunction granted on 6 May 1982 and the Order made herein on a date to be fixed by the Registrar:
>
> 1. An injunction granted herein on 6 May 1982 restraining the 1st defendants (whether by their Directors or their servants or agents or any of them or otherwise whatsoever) be and is hereby continued until further order ...

Three days later, on 24 May 1982, the respondents' application to discharge the injunctions granted on 6 May 1982 and 21 May 1982 was heard by Lai Kew Chai, J who after hearing Counsel for the parties discharged the injunctions and ordered damages to be assessed by the Registrar. The appellants now appeal against the decision of Lai Kew Chai J.

At the hearing of the appeal, the Court was informed that in an O. 14 application heard by the Registrar the previous day, the respondents were given leave to defend the action on condition that the sum of US$700,000 be paid into Court or a banker's guarantee be provided within fourteen days from the date of the Registrar's order.

One of the contentions raised by the appellants is that the consent order of 21 May 1982 was made in consideration of the 2nd respondents undertaking as set out in the said order of Court as follows:

> They have not whether before or since the Order of Court herein dated 6 May 1982 sold, charged, pledged, offered or given as security or disposed of by any means whatsoever whether within or without the jurisdiction of any part of their interests in the property known as No. 75 High Street, Singapore (save for the mortgage to Tan Jin Chwee & Co. Ltd. for S$100,000) and upon the 2nd defendants further undertaking to this Honourable Court that they will not except with the plaintiffs' prior consent in writing (which consent the plaintiffs agree will not be unreasonably withheld) or pursuant to Order of this Honourable Court sell, charge, pledge, offer or give as security or dispose of by any means whatsoever, whether within or without the jurisdiction, any part of their interests in the property known as No. 75 High Street, Singapore (save for the mortgage to Tan Jin Chwee & Co. Ltd. for S$100,000).

It is submitted that the respondents were contractually bound by their undertakings as embodied in the said order of Court which, though it expressly reserved to the respondents the right to apply for discharge of the injunctions granted by the orders of Court of 6 May 1982 and 21 May 1982, did not expressly reserve any right to apply to the Court to release the respondents from their undertakings. The submission is that, accordingly, the discharge of the injunctions by Lai Kew Chai J did not or could not discharge the respondents from their undertakings which were contractual obligations unless there were grounds to set them aside as a contract. We cannot accept that submission. If the decision of Lai Kew Chai J is correct, the Mareva injunction granted on 6 May 1982 should not have been granted and could not have been continued, even as varied, by the order of Court of 21 May 1982. In any event, in our judgment, assuming that the undertakings are contractual in nature, it must

be an implied term of the contract that if the injunctions are subsequently discharged after the merits of the application for a Mareva injunction had been decided by a Court, that any order made by the Court would displace the earlier consent order of Court of 21 May 1982. It is also, in our opinion, plain, as the parties negotiated and agreed to the consent order on the basis that it was to be an interim order binding "until further order" that the undertakings would lapse in the event of the discharge of the Mareva injunction.

The substantive issue in this appeal is whether the decision of Lai Kew Chai J in discharging the Mareva injunction either in the form granted by the order of Court of 6 May 1982 or in the form granted by the order of Court of 21 May 1982 was a wrongful and/or unlawful exercise of his discretion. The appellants contend that Lai Kew Chai, J was wrong in his application of principle to the facts in his assessment of the risk of the respondents removing their assets from the jurisdiction and so stultifying any judgment given by the Court in the action. It is submitted that on the facts before him Lai Kew Chai J ought to have come to the conclusion that there was a real risk of the assets being removed out of the jurisdiction.

It is said that Lai Kew Chai J ought to have inferred that there was a real risk of the respondents transferring their assets out of the jurisdiction because (1) the evidence before him showed that the respondents were in considerable financial trouble and there was no light at the end of the tunnel; (2) the respondents' failure to pay the appellants coupled with the delay and lack of candour on their part; (3) the respondents' conduct raises great suspicion; (4) the respondents at no time have been prepared to say they will meet any judgment and (5) the evidence of express intention to take out assets.

With regard to (5) the appellants sought leave to adduce fresh evidence in the form of an affidavit by a director directed to show that the partners of the 2nd respondent had in the recent past demonstrated their serious intention of transferring their most invaluable single asset, No. 75 High Street, Singapore and that that asset can easily be transferred to any company or party outside the jurisdiction. We do not think, even if the affidavit was before Lai Kew Chai J that it would have affected his decision and in our judgment, on the evidence before him Lai Kew Chai J was entitled to exercise his discretion in favour of discharging the Mareva injunction.

The final contention is that as there was no application before him, the Judge was wrong in taking action on his own initiative to make an order for immediate assessment and payment thereafter of damages. It is said that it is contrary to general principles to make such an order at that stage of the action and that the proper time was at the conclusion of the trial of the action by the trial Judge when all the evidence was before the trial Judge. The appellants relied on the judgment of Plowman J in *Ushers Brewery v. King & Co.* [1972] (1) Ch 148].

We cannot extract from that judgment any general principle applicable to all cases where a Court grants an interim injunction, *ex parte* on the applicant's undertaking as to damages. The interim injunction in the present case is a Mareva injunction. It is not a case where the final remedy sought is for a permanent injunction. The appellants do not dispute the respondents' right to an inquiry as to damages as indeed they could not having regard to the terms of their undertaking to the Court as contained in the orders of Court of 6 May 1982 and 21 May 1982. In these circumstances Lai Kew Chai J was entitled to make the order for immediate assessment and payment of any damages sustained by the respondents by reason of the Mareva injunction.

The appeal is dismissed with costs.

Also found at [1983] 1 CLJ 342